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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1975

No. 75-811

SUPERIOR COURT OF THE
DISTRICT OF COLUMBIA, et al.,

Petitioners,

v.

ROOSEVELT F. PALMORE,

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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III

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BRIEF FOR RESPONDENT IN OPPOSITION

Opinions Below

The opinion of the United States Court of Appeals for the District of Columbia Circuit, sitting en banc, is reported at 515 F.2d 1294, and is reproduced in the Petition for Writ of Certiorari (Pet. at 1a-52a). The memorandum order of the United States District Court for the District of Columbia is not officially reported, but is also set forth in the petition (Pet. at 55a-56a).

Jurisdiction

The judgment of the Court of Appeals was entered on July 9, 1975. By order entered October 9, 1975, the Chief Justice extended the time for filing a petition for writ of certiorari to and including November 6, 1975. By a second order, entered on October 29, 1975, the Chief Justice further extended the time for filing a petition for writ of certiorari to and including December 6, 1975. The petition was filed on December 5, 1975, and this Court's jurisdiction was invoked pursuant to 28 U.S.C. § 1254(3). The jurisdiction

of the United States District Court in this case was invoked pursuant to 28 U.S.C. §§ 2241 et seq. and, alternatively, pursuant to 28 U.S.C. § 1331.[1/]

Reasons for Treating the Cases Separately

To avoid confusion with the other respondent in this multi-case petition, we refer throughout this opposition to "Palmore" instead of the more customary "respondent". While we do not question the permissibility under Rule 23(5) of the Rules of this Court of the filing of a single petition, these cases were not consolidated in either of the courts below and there are some potentially significant differences between the cases. For example, implicated in Pressley are questions of exhaustion and jurisdiction over the custodian (Pet. at 14 n.9, 20 n.11) which are not involved in Palmore's case. Conversely, Palmore, unlike Pressley, alternatively invoked the jurisdiction of the District Court pursuant to 28 U.S.C. § 1331. Consequently, we believe that this Court should consider the single petition as tendering two cases, not one, for review. In particular, if certiorari is to be granted, this Court may well conclude that the writ should issue in one case only (holding the other case for subsequent disposition) or, more appropriately, to grant the writ in both cases, setting each for separate briefing and oral argument as did the Court of Appeals.

1/ Palmore's initial application for writ of habeas corpus invoked only the habeas corpus jurisdiction of the District Court pursuant to 28 U.S.C. §§ 2241 et seq. and under Art. I, § 9, cl. 2 and Art. III § 2 of the Constitution. When petitioners contended in the Court of Appeals that the "plain words" of 23 D.C. Code § 110(g) barred the district judge from exercising his federal habeas corpus jurisdiction, Palmore sought and was granted leave by a unanimous en banc Court of Appeals to amend his jurisdictional allegations pursuant to 28 U.S.C. § 1738. Palmore filed amended jurisdictional allegations in the District Court contending that his case arises directly under the Fourth Amendment to the Constitution, involves an amount in controversy in excess of $10,000, exclusive of interest and costs, and thereby invoked the District Court's jurisdiction pursuant to 28 U.S.C. § 1331. Those amended jurisdictional allegations are now in the record and, as we show infra pp.19-21 , constitute a separate basis for sustaining the judgment of the Court of Appeals in this case.

Questions Presented

1. Did Congress, by enactment of a post-conviction remedy statute applicable to the local District of Columbia courts, 23 D.C. Code § 110, implicitly repeal the habeas corpus jurisdiction of all United States District Courts set forth in 28 U.S.C. §§ 2241 et seq. and, if it did, was Palmore's case nonetheless within the jurisdiction of the United States District Court by virtue of 28 U.S.C. § 1331?

2. If 23 D.C. Code § 110 is read, as petitioners urge, to bar Palmore from all access to the United States District Courts, is that statute unconstitutional because it thereby: (1) constitutes a suspension of the writ of habeas corpus in violation of Article I, § 9, cl. 2 of the Constitution of the United States and (2) deprives Palmore of due process of law in violation of the Fifth Amendment to the Constitution of the United States in that it invidiously discriminates between those persons convicted before the Superior Court of the District of Columbia, on the one hand, and those convicted before any other federal or state court, on the other hand?

Constitutional and Statutory Provisions Involved

In addition to the constitutional and statutory provisions set forth in the petition for writ of certiorari (Pet. at 3-4, 70a-79a), Palmore contends that 28 U.S.C. §§ 1331, 2201-2202, and 2244 are also involved in this case. Pertinent portions of those statutes are set forth in Appendix A, infra.

Statement

Five years ago, two plainclothes officers observed Palmore lawfully driving on a District of Columbia street in a rented automobile. Curious to know whether the vehicle was stolen and whether the driver was properly licensed, the officers, aided by two other plainclothes officers in a second unmarked police cruiser, forced Palmore to the

side of the road with their police siren and red flashers. During the ensuing conversation, in which it developed that Palmore was in possession of a valid license and that the vehicle was not stolen, one of the officers shined a light into the interior of the vehicle and, according to testimony credited by the trial judge, observed in plain view the hammer mechanism of a gun. Palmore was arrested and charged with carrying a gun without a license, a violation of 22 D.C. Code § 3204.

Before his trial in the Superior Court of the District of Columbia, Palmore moved in a timely fashion for an order suppressing the gun as evidence on the ground that it was the fruit of an unreasonable seizure of his person and an unreasonable search of his vehicle. The local trial judge overruled the motion and Palmore was subsequently convicted and sentenced to imprisonment and probation. The District of Columbia Court of Appeals affirmed the conviction after fully considering and rejecting Palmore's Fourth Amendment claim. Palmore v. United States, 290 A.2d 573, 580-584 (D.C. App. 1972). On April 24, 1973, this Court declined to review that facet of the local appellate court's judgment. Palmore v. United States, 411 U.S. 389, 397 n.6 (1973).

On May 15, 1973, Palmore filed an application for writ of habeas corpus in the United States District Court for the District of Columbia. In that petition, Palmore alleged that he was in custody in violation of the Fourth Amendment and that "[n]o judge or court of the United States has determined the legality of [his] detention on the grounds set forth herein, either on prior application for writ of habeas corpus or otherwise." On July 10, 1974, the District Court dismissed Palmore's application for want of jurisdiction. Palmore perfected an appeal to the United States Court of Appeals for the District of Columbia Circuit. That court, which sua sponte heard the case en banc, reversed the District Court's order of dismissal and remanded the case for consideration on the merits of Palmore's Fourth

Amendment claim. One judge dissented. The other eight judges all joined in a single opinion authored by Judge Tamm.

ARGUMENT

After fully considering each of the arguments again advanced by petitioners in this Court, the Court of Appeals held that the District Court had erred in dismissing Palmore's case. While noting that constitutional issues would surface if the federal courts lacked such jurisdiction, the Court of Appeals resisted petitioners' efforts to propel it to resolution of such novel and difficult problems. Instead, faithful to principles of statutory construction firmly rooted in the decisions of this Court, the Court of Appeals concluded that Congress had not intended to affect the jurisdiction of the district courts when it enacted 23 D.C. Code § 110 and thereby provided, for the first time, a statutory post-conviction procedure for the local District of Columbia courts. Judge Tamm could not have been more careful in limiting the holding of the court:

> In conclusion, we emphasize what we do and do not hold today. We hold that section 110(g) does not affect article III habeas jurisdiction. We do so after concluding that Congress never intended that result; if our interpretation is erroneous, Congress stands available to enlarge upon or clarify the statute. [Citation omitted]. We reach no decision on the constitutional issues raised here; while their substantiality affected our consideration of the statute, demarcation of the extent of the constitutional restraints that the equal protection guarantee and the suspension clause impose upon Congress' power to allocate jurisdiction must await the day Congress more explicitly asserts that power. 515 F.2d at 1314; Pet. at 48a.

An application for review by this Court of an 8-1 en banc judgment of the United States Court of Appeals for the District of Columbia Circuit construing a provision of the District of Columbia Code is an unusual event. Whatever the considerations that might otherwise prompt this Court to add to its docket a case involving nothing more than construction of the seventh sub-section of the local District of Columbia post-conviction remedy statute, this petition,

which does no more than to reassert the statutory construction which petitioners unsuccessfully asserted below, hardly presents a truly compelling justification for further consideration here. In any event, as we now demonstrate, the decision of the Court of Appeals is correct and assuredly presents no issue of statutory construction or general importance warranting review here. Moreover, as we separately show, documents furnished to Palmore by the Department of Justice after the Court of Appeals issued its opinion establish that the court correctly construed the statute. Finally, we show that even accepting petitioners' "plain words" theory (Pet. at 15, 21, 22, 24), and putting to one side petitioners' own documents, the judgment of the Court of Appeals is sustainable on grounds other than those relied upon below.

I

The En Banc Court of Appeals Properly Decided this Case

Palmore's application for a writ of habeas corpus alleged that he was in custody[2/] in violation of the Fourth Amendment to the Constitution and that he had exhausted his remedies in the local court system in an unsuccessful effort to regain his liberty. It is therefore clear, as the Court of Appeals held, that Palmore correctly invoked the statutory habeas corpus jurisdiction of the District Court pursuant to 28 U.S.C. §§ 2241 et seq. The nub of this case, therefore, is petitioners' contention that Congress, by enactment of 23 D.C. Code § 110, simultaneously repealed a portion of the district courts' habeas corpus jurisdiction granted by 28 U.S.C. §§ 2241 et seq. so as to exclude from its reach those, such as Palmore, who have

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2/ When Palmore's application for the writ of habeas corpus was filed, he was on bail pursuant to an order of the Superior Court of the District of Columbia, a status constituting custody within the meaning of the federal habeas corpus statutes. Hensley v. Municipal Court, 411 U.S. 347 (1973). The Attorney General of the United States and the Director of the District of Columbia Department of Corrections were also named as respondents to the habeas action since, absent a bail order by the habeas judge, Palmore would have been remitted to their custody. The habeas judge, with the consent of petitioners, entered orders continuing Palmore's bail pending disposition and appeal.

been convicted by the Superior Court of the District of Columbia.[3/]

The Court of Appeals gave meticulous consideration to each of the arguments which petitioners again advance here. While petitioners urged that the meaning of § 110(g) was so plain as to preclude any inquiry beyond the face of the statute, the Court of Appeals was properly mindful that its task was to ascertain and implement the purpose of Congress and that a repeal by implication, particularly of a jurisdictional or remedial statute, is not the ordinary way by which Congress manifests its intent.

In this case, petitioners' plain meaning and repeal-by-implication argument is made even more difficult since two separate legislative codes are involved. Congress was quite careful to amend appropriate jurisdictional provisions set forth in Title 28 of the United States Code to accommodate redistribution of "local" and "federal" judicial power as part of its comprehensive reorganization of the District of Columbia courts.[4/] Given these explicit excisions of the jurisdiction of the district courts, the Court of Appeals concluded that it was quite unlikely that Congress really intended, by opaque reference in the District of Columbia Code, to amend an express jurisdictional grant contained in the United States Code and applicable to all federal district courts wherever they may sit.[5/] Particularly when the jurisdiction at issue was the power to

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3/ This case does not raise the issue of the availability of the writ to examine Fourth Amendment claims. Petitioners did not raise that point in the Court of Appeals and they do not now press for re-examination of cases such as Kaufman v. United States, 394 U.S. 217 (1969).

4/ For example, Congress added 28 U.S.C. § 1363, as part of the Court Reorganization Act, and thereby excised from the jurisdiction of the district courts those cases arising under Acts of Congress applicable exclusively to the District of Columbia. The Court of Appeals pointed to other instances where Congress amended the United States Code to accomplish its jurisdictional purposes. 515 F.2d at 1308; Pet. at 31a-33a.

5/ Congress has carefully distinguished between the effect of provisions in the United States Code, on the one hand, and the District of Columbia Code on the other. 1 U.S.C. § 204. Notwithstanding

issue the writ of habeas corpus which had formed such a fundamental part of the original jurisdiction of the federal trial courts since the Judiciary Act of 1789, the Court of Appeals refused to attribute to Congress the result which petitioners advance solely by reference to the plain words of a single sub-section. Instead, aware that "generalities about statutory construction * * * are not rules of law but merely axioms of experience",[6/] the Court of Appeals turned to the legislative materials and found that a quite different purpose prompted enactment of 23 D.C. Code § 110.

The only explicit legislative reference to § 110 is that contained in the committee reports:

> Section 23-110 is new. Rather than relying on the inherent power of the superior court to review judgments of conviction, the new section provides statutory procedures for post-conviction challenges. Section 23-110 is modeled upon 28 U.S.C. section 2255 with only the necessary technical changes.

S. Rep. No. 91-405, 91st Cong., 1st Sess. 38 (1969); H.R. Rep. No. 91-907, 91st Cong., 2d Sess. 117 (1970).[7/] Read against prior case

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this legislative distinction, we assume arguendo that Congress may, if it choses, amend the United States Code by enacting a provision in the District of Columbia Code although we know of no instance where it has done so without an accompanying United States Code amendment nor has the Government, in the entire course of this litigation, ever cited such an example to us. Our point is not that Congress necessarily lacks power to amend one code by a provision in the other, but rather that an argument for a statutory construction which is forced to rely on that premise is not likely to be an argument in accord with the legislative understanding or intent.

6/ 515 F.2d at 1307; Pet. at 30a-31a. The suggestion that the Court of Appeals thereby departed from accepted principles of statutory construction and ran afoul of the holding of this Court in Caminetti v. United States, 242 U.S. 470, 485-486 (1917), is wholly without merit. Over Justice Sutherland's dissent, this Court long ago dispelled the notion that the plain meaning approach to statutory construction was a rule of law. Boston Sand Co. v. United States, 278 U.S. 41, 48 (1928) (Holmes, J.). See also, Cass v. United States, 417 U.S. 72, 76-79 (1974); United States v. American Trucking Associations, 310 U.S. 534, 545 (1940). If anything was left of the plain meaning point, Professor Arthur W. Murphy of Columbia Law School put the matter to rest with his recently published article, Old Maxims Never Die: The "Plain-Meaning Rule" and Statutory Interpretation in the "Modern" Federal Courts, 75 Colum. L. Rev. 1299 (1975). As Professor Murphy notes, "[w]ith the possible exception of the Packard Motor Car Co. case [330 U.S. 485], in no case since American Trucking has the Supreme Court actually refused to look at legislative history." 75 Colum. L. Rev. 1303.

7/ Although the Court of Appeals was unaware of the fact, it has now developed that the language set forth in the legislative reports was submitted to the Speaker of the House of Representatives by the Attorney General of the United States. See infra, pp. 15-19.

law from the local District of Columbia courts which held that no statutory post-conviction remedy existed for local prisoners who were forced instead to rely on the "inherent power" of the local courts for post-conviction relief, the Court of Appeals had no difficulty in ascertaining a legislative intention to create a statutory remedy for the newly created Superior Court. 515 F.2d at 1306-1307; Pet. at 28a-31a. While it was understandable that Congress used its federal post-conviction remedy statute, 28 U.S.C. § 2255, as a model for its new local statute, the Court of Appeals refused to woodenly transplant the judicial construction which accompanies a federal statute enacted in 1948 and addressed to a nationwide federal problem to a local statute enacted in 1970 and designed to fill a void in local jurisdiction. 515 F.2d at 1306-1307; Pet. at 28a-33a.

Instead, the Court of Appeals looked to Congress to determine the appropriate jurisdictions of the two court systems in the District of Columbia. The legislative guidance could not have been more explicit: the local courts were to deal with local matters; the federal courts were to exercise "the jurisdiction exercised by the Federal courts in the several States"; and the resulting court system would be "a Federal-State court system in the District of Columbia analogous to court systems in the several states." S. Rep. No. 91-405, 91st Cong., 1st Sess. 5 (1969); H.R. Rep. No. 91-907, 91st Cong., 2d Sess. 34-35 (1970). A contention, such as petitioners advance here, that the federal courts lack their historic habeas corpus jurisdiction "is flatly inconsistent with this congressional purpose." 515 F.2d at 1309; Pet. at 35a. A construction, such as Palmore urged below, that such a statute must be read as this Court read a not dissimilar statute in Brown v. Allen, 344 U.S. 443 (1953),[8/] not only

8/ Like § 110(g) and 28 U.S.C. § 2255, 28 U.S.C. § 2254, the statute involved in Brown v. Allen, can be read to bar all access to federal courts. Parker, Limiting the Abuse of Habeas Corpus, 8 F.R.D. 171, 176 (1949). In that case, this Court rejected such a reading and construed § 2254 as an exhaustion of remedies provision instead.

accords with the legislative vision of the dual court system in the District of Columbia, but is harmonious with this Court's description of that system. Pernell v. Southall Realty, 416 U.S. 363, 367 (1974); Palmore v. United States, 411 U.S. 389, 408-409 (1973). That the en banc Court of Appeals, after careful consideration of petitioners' arguments, found those contentions incompatible with the statute and the legislative understanding is scarcely a reason for a further review by this Court.[9/]

There is, however, more to this case than the usual problem of selecting one of two alternative readings of a statute. Here, if petitioners' reading of § 110(g) be accepted, extraordinarily difficult constitutional questions must be decided. Fully aware that if the legislature has clearly intended an unconstitutional result a court must not shirk from saying so,[10/] the Court of Appeals resisted petitioners' efforts to force it toward needless constitutional adjudication. Whether, consistently with the Suspension Clause of the Constitution,[11/] Congress may, at one and the same time, ordain and establish an inferior court of the United States pursuant to Article III of the Constitution and then deprive that court of the power to issue a writ of habeas corpus if it finds a citizen being deprived of his liberty in violation of the federal Constitution is a question that strikes to the heart of Article III and the role of the national judiciary. Each time that contention has been raised in this Court, the Court has declined to attribute such an intention to Congress and has instead construed the statute at issue as an exhaustion provision. E.g., Gusik v. Schilder, 340 U.S. 128, 132-133 (1950); Brown v. Allen, 344 U.S. 443 (1953).

9/ Although the Court of Appeals did not know it, the exhaustion reading which it gave to § 110(g) is precisely the reading which Department of Justice personnel involved in the drafting and submission of the statute had articulated in an internal working memorandum. See infra, pp. 15-17.

10/ See 515 F.2d at 1299, 1306; Pet. at 9a, 27a.

11/ U.S. Const., Art. I, § 9, cl. 2.

The Court of Appeals found instructive this Court's unanimous holding in Gusik:

> If Congress had intended to deprive the civil courts of their habeas corpus jurisdiction, which has been exercised from the beginning, the break with history would have been made plain and unmistakable.

340 U.S. at 132-133 (footnote omitted).

The Court of Appeals found it significant, as do we, that Congress, despite its careful and prolonged debate of other constitutional issues raised by different provisions of the District of Columbia Court Reform and Criminal Procedure Act of 1970,[11/] did not even evidence an awareness that it was being asked to deprive the national courts of their habeas corpus jurisdiction over federal constitutional claims, much less a plain and unmistakable intention to do so. 515 F.2d at 1310-1311; Pet. at 38a-41a. Particularly since Congress had so recently engaged in exhaustive debate over the constitutional limits of the Suspension Clause in considering and rejecting another proposal to restrict the availability of the Great Writ,[12/] the Court of Appeals declined to attribute to the same legislature the choice to implicate those issues without debate or discussion in this statute. That is not only exactly the way a court is supposed to construe a statute, particularly one involving a claim of implied repeal of federal habeas corpus jurisdiction,[13/] it is entirely consistent with the deference which one branch of the Government owes another. The Court of Appeals was aware of the ongoing debate involving the use of federal habeas corpus jurisdiction and the proper reach of the national judicial power, and it knew that

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12/ See S. 917, 90th Cong., 2d Sess. § 702 (1968). Senator Tydings, a leading opponent of that bill but a principal architect of this one, solicited the views of 212 legal scholars from 43 law schools on the constitutional issues raised and delivered an extensive speech on those issues. 114 Cong. Rec. 14136-14137, 14183 (1968). The proposal was defeated, chiefly because the Congress had serious doubts as to the constitutionality of such a restriction on the availability of the writ. See, e.g., Paschal, The Constitution and Habeas Corpus, 1970 Duke L.J. 605, 606-607.

13/ E.g., Sanders v. United States, 373 U.S. 1, 14 (1963).

Congress was grappling with the policy and constitutional issues posed by a further legislative proposal to curtail that jurisdiction.[14/] The Court of Appeals discerned no legislative intent to remove the citizens of the District of Columbia from that far-reaching issue of national concern,[15/] nor did it discover a shred of evidence that Congress was aware it had launched for judicial decision in this statute the very constitutional issue it had retained for deliberation in another. In these circumstances, the court quite correctly declined petitioners' invitation, repeated here, to engage in constitutional adjudication.[15/]

Finally, the Court of Appeals continued to shun a supervisory role over the local courts,[16/] and its holding that the habeas corpus jurisdiction of the federal courts was not repealed by creation of a local post-conviction remedy most assuredly does not alter the legislative allocation of jurisdiction between the two court systems. Since reorganization, the courts in the District of Co-

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14/ S. 567, 93d Cong., 1st Sess. (1973). For preliminary discussion of some of the constitutional issues which members of Congress see as posed by the pending legislation, see 119 Cong. Rec. 2220-2247 (1973).

15/ For precisely the same reasons, the Court of Appeals correctly ruled as premature decision of the Fifth Amendment issues which would arise if Congress singled out District of Columbia citizens and barred then from the national courts for resolution of federal constitutional claims arising from local incarcerations while permitting all others, including those incarcerated by judgments of the Court of Military Appeals or the federal territorial courts, to enjoy such a right. That issue is hard enough, but when it is complicated by the fact that in the District of Columbia the same prosecutor is involved in both the local and federal courts and, on petitioners' reading of the statute, can thereby grant or bar access to the national courts by the simple expedient of selecting a federal or local statute on which to base a criminal charge, the problem becomes an extraordinarily difficult one. The Court of Appeals quite properly reserved that point, together with the suspension issue, until the day that Congress manifests an intent to condition entry to the national courts for resolution of constitutional claims upon the happenstance of the code provision which the United States Attorney selects in a given case arising in the District of Columbia.

16/ 515 F.2d at 1298, 1314; Pet. at 5a-6a, 48a-49a. Judge Tamm, author of the en banc opinion, has been particularly sensitive to the delicate relationship between the two court systems in the District of Columbia. Holly v. United States, 464 F.2d 796, 799-800 (D.C. Cir. 1972) (concurring opinion).

lumbia have accommodated their respective jurisdictions quite compatibly using as the beacon the clearly articulated "state-federal" mold by which Congress deliberately fashioned the dual court system.[17] The decision of the Court of Appeals fits precisely into the federal-state relationship deliberately created by Congress and recognized by each of the courts involved while, at the same time, accords to the District of Columbia Court of Appeals its rightful status as the highest court of the District of Columbia.[18]

17/ E.g., Luck v. Baltimore & Ohio Railroad Co., 510 F.2d 663 (D.C. Cir. 1975); M.A.S., Inc. v. Van Curler Broadcasting Corp., 357 F. Supp. 686, 690-691 (D.D.C. 1973); M.A.P. v. Ryan, 285 A.2d 310, 312 (D.C. App. 1972); Geisha House, Inc. v. Wilson, 43 L.W. 2152 (D.C. Super. Ct. 1973) (Greene, C.J.). It is not without significance, we submit, that this Court's Advisory Committee has proposed that the Superior Court of the District of Columbia be deemed a "state court" for purposes of the national habeas corpus statutes. Rule 13 of the Proposed Rules Governing Habeas Corpus Proceedings for the United States District Courts, 93 S. Ct. 34, 89 (1973).

18/ Petitioners notwithstanding, there is no dispute between the courts involved in reorganization over the exercise of federal jurisdiction by the federal courts. Only the happenstance of Palmore's custodial status at the time his petition for writ of habeas corpus was filed, see supra at 6 n.2, permits the Government to assert the existence of such a dispute on behalf of petitioner Superior Court. In fact, the reported decisions of the local courts carefully follow the state-federal model which Congress used as the touchstone in its jurisdictional allocations between the local and federal courts. The decision of the Court of Appeals in this case hews that line precisely. That decision also recognizes the proper status of the local court of appeals.

Congress provided that the District of Columbia Court of Appeals is the highest court "of" -- not "in" -- the District of Columbia. 11 D.C. Code §§ 101, 102. As the highest local court, its judgments on matters of local law are probably final and its judgments implicating federal constitutional issues are only subject to this Court's appellate jurisdiction pursuant to 28 U.S.C. § 1257. A federal habeas judge does not exercise appellate jurisdiction over the judgment of another court. Fay v. Noia, 372 U.S. 391, 429-431 (1963). Indeed, a habeas judge lacks power to revise the judgment of a local court, although he has both the power and the duty to act upon the body of the habeas applicant. In discharging this responsibility, the habeas judge may appropriately give deference to the considered judgment of the local court on questions of federal constitutional law but, at bottom, the habeas judge must exercise an independent judgment on such questions. Townsend v. Sain, 372 U.S. 293, 318 (1963). The Court of Appeals went to the heart of the matter when it observed that a claim arising under the Constitution is not a purely local matter. 515 F.2d at 1310, Pet. at 38a. Those who claim the final say for the local courts on matters of federal constitutional law overlook this fundamental point. Brown v. Allen, 344 U.S. 443, 508, 510-513 (1953) (Frankfurter, J., concurring).

Just as it does in the several states, exercise of federal habeas corpus jurisdiction in the District of Columbia requires sensitive accommodation to the respective spheres of judicial authority. That process is already underway. The local court of appeals

Had the Court of Appeals held the other way, startling jurisdictional consequences would have ensued. First, absent the federal courts' habeas corpus jurisdiction, this Court's involvement in constitutional issues arising in the District of Columbia would have been significantly increased,[19] and compelling demands on this Court's "original" habeas corpus jurisdiction would inevitably be made.[20] Second, the federal courts in the District of Columbia would exercise a disruptive pre-trial habeas corpus jurisdiction on application of a local prisoner seeking redress for a

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has announced that it will not disregard a precedent established by the circuit court prior to court reorganization unless it sits en banc to reconsider the point. M.A.P. v. Ryan, 285 A.2d 310 (D.C. App. 1972). Conversely, the Court of Appeals sua sponte heard this case en banc. Left to work out the accommodations necessary to make court reorganization function harmoniously and in accord with the respective jurisdiction which Congress entrusted to each of the judicial participants in the reorganization process, there is no reason to believe -- least of all at this stage -- that appropriate institutional attention will not be given to those few occasions on which the courts may have different constitutional judgments. The time for this Court to consider intervention in the reorganization process, we submit, is the day such a constitutional difference of opinion manifests itself.

19/ In these days of crowded dockets, federal habeas corpus serves a systemic role and presents this Court with the opportunity to avoid what would otherwise be pressing claims to a place on its docket and to await instead the fleshing out of a cloudy factual record, or the informed deliberation of a difficult constitutional issue by the lower federal courts. Absent such a jurisdiction, as this Court has already recognized, a "special responsibility" to resolve disagreements between the local and the federal courts on matters of constitutional law would likely arise. Pernell v. Southall Realty, 416 U.S. 363, 368 n.4 (1974). This would particularly be true in the District of Columbia where the United States Attorney is free to select either a local or a federal criminal charge in many instances, and where he operates free of the leveling effect of the Solicitor General's office in determining whether to prosecute an appeal to the District of Columbia Court of Appeals. See Pet. at 18 n.10, indicating that the United States Attorney prosecuted over half of the appeals to the District of Columbia Court of Appeals in criminal cases raising constitutional questions.

20/ The writ of habeas corpus, unlike the writ of certiorari, is a writ demandable of right. Fay v. Noia, 372 U.S. 391, 435-438 (1963); Brown v. Allen, 344 U.S. 443, 452-457 (1958); id., 344 U.S. at 489-497 (Frankfurter, J., concurring). As petitioners properly conceded below, 515 F.2d at 1302 n.19; Pet. at 16a n.19, this Court's habeas corpus jurisdiction is not solely statutory, and the Court of Appeals has outlined the jurisdictional implications of petitioners' statutory argument on the "original" habeas corpus jurisdiction of this Court. 515 F.2d at 1300-1302; Pet. at 12a-16a.

claimed deprivation of federal constitutional rights.[21] Finally, the careful structuring of the national federal habeas corpus statutes which Congress has painstakenly erected over the years would be frustrated.[22] A decision refusing to attribute to Congress a purpose to create such bizarre jurisdictional consequences is not a likely candidate for further review by this Court.

II

Department of Justice Documents Support the Decision Below

With the consent of the Solicitor General, we have set forth in the appendix documents furnished to us by the Department of Justice after the Court of Appeals handed down its decision in this case, but well before the petition for writ of certiorari was filed

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21/ Even the most literal reading of § 110(g), as petitioners have conceded, affects only the post-conviction habeas corpus jurisdiction of the federal district courts. 515 F.2d at 1306, 1310 n.40; Pet. at 26a-27a, 38a n.40. Habeas corpus jurisdiction, of course, does not require a judgment of conviction as a precondition to its exercise. Detention, not conviction, is all that is needed. Fay v. Noia, 372 U.S. 391, 430 (1968). To be sure, the usual action of a federal habeas judge asked to intervene prior to trial in a local court proceeding is to abstain and require exhaustion of local remedies just as the Court of Appeals required in this case. 515 F.2d at 1313-1314; Pet. at 47a-49a. But abstention is not abdication, and it would be difficult to justify a refusal to act before trial on a jurisdiction which is uncontestably plain if, as petitioners argue, the consequence of that refusal would be an ouster of jurisdiction once the trial had been concluded.

22/ As part of its comprehensive federal habeas corpus legislation, Congress has authorized a federal habeas judge to decline to readjudicate a constitutional issue once determined by a "judge or court of the United States." 28 U.S.C. § 2244. See Sanders v. United States, 373 U.S. 1 (1963); Brown v. Allen, 344 U.S. 443, 508-510 (1953) (Frankfurter, J., concurring). Had the Court of Appeals ruled with petitioners, that legislative assurance of one ruling on a constitutional issue by a "judge or court of the United States" -- a term well understood to refer to the Article III judiciary -- would have been set at naught, and this quite independently of whether the Suspension Clause guarantees a habeas applicant the right to such an adjudication. It is right at this point that those who rely on the federal post-conviction statute, 28 U.S.C. § 2255, founder. Section 2255 fits quite comfortably alongside § 2244, for that statute merely assigns a litigant to one "judge or court of the United States" instead of another. Petitioners' reading of § 110(g), on the other hand, is flatly at odds with the guarantee of § 2244, for Congress was careful to define the Superior Court of the District of Columbia as a "District of Columbia court", not a "federal court" and certainly not a "court of the United States." 11 D.C. Code § 101.

in this Court.[23] We believe those documents furnish additional support for the decision below.

Much of what eventually became the District of Columbia Court Reorganization and Criminal Procedure Act of 1970 originated in a legislative proposal submitted to the Congress by the Department of Justice and transmitted to the Speaker of the House of Representatives on July 11, 1969 by the Attorney General.[24] That same month, Department of Justice personnel engaged in the drafting and submission process prepared a comprehensive working memorandum dealing, inter alia, with § 110. Examination of the working memorandum[25] demonstrates that: (1) the Court of Appeals correctly discerned that the purpose of this section was to fill the statutory gap left by the local court decisions in Burke v. United States, 103 A.2d 347 (D.C. Mun. App. 1954) and Ingols v. District of Columbia, 103 A.2d 879 (D.C. Mun. App. 1954), and to create a statutory post-conviction remedy for the newly created local courts,[26] and (2) that the ex-

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23/ During oral argument before the Court of Appeals, Judge Leventhal asked petitioners' counsel whether § 110 had been proposed by the Department of Justice and, if so, whether Congress had been informed that the sub-section at issue here would have the jurisdictional implications for which petitioners contend. Counsel replied that the statute had indeed been drafted by the Department of Justice, but he was uncertain whether the legislature had been advised of the alleged jurisdictional effects of sub-section (g). After the Court of Appeals handed down its decision, and while the Solicitor General was considering a request to file the present petition, we requested him to authorize us to inspect any documents bearing on Judge Leventhal's question. The Solicitor General kindly arranged for us to do so, and we were furnished the documents set forth in the appendix during September, 1975 by the Department of Justice. By letter dated December 23, 1975, the Solicitor General authorized us to represent to the Court that he has no objection to reproduction of these documents in the appendix to this brief in opposition although he does not "necessarily agree that they have any bearing on the issue before the Supreme Court" in this case.

24/ Hearings on H.R. 13689 et al., before Subcom. No. 1 of the Com. on the Dist. of Col., 91st Cong., 1st Sess. at 4-5 (1969).

25/ The working memorandum is a thick document which contains a section-by-section analysis of the proposed legislation and frequently includes a discussion of the proposed effects of the section at issue or the legal issues raised by the section. We have reproduced pages 33-35 of the original memorandum, the pages which contain the whole discussion of § 110, together with the cover sheet in the Appendix. See infra, pp. 2a-5a.

26/ Compare 515 F.2d at 1306-1307; Pet at. 28a-31a with Appendix, infra, at 2a-5a.

haustion reading put on § 110(g) by the Court of Appeals in this case is exactly the reading given the forerunner of that section by these Department of Justice personnel:

> The only changes are in the court name and in the last paragraph (item 4) which has been altered to make it clear that a habeas corpus motion shall not be entertained in any court unless the prisoner has first filed motion to vacate judgment in the Superior Court of the District of Columbia when that is the appropriate remedy. 27/

Moreover, when the Attorney General transmitted the proposed legislation to the Speaker of the House of Representatives, he included a "summary" of the suggested statute. With respect to § 110, the Attorney General stated:

> Section 23-110 is new. Rather than relying on the inherent power of the Superior Court to review convictions, it applies statutory procedures for post-conviction challenges. It follows 28 U.S.C. 2255 with only the necessary technical changes. 28/

That is the language which was included, in haec verba, in both committee reports as the statute was passed. 29/ Just as important,

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27/ See Appendix, infra, at 4a. Minor changes were made in what eventually became § 110(g), but those changes are irrelevant for present purposes:

1969 Draft	Present § 110(g)
An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief, by motion pursuant to this section shall not be entertained in any court if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.	An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section shall not be entertained by the Superior Court or by any Federal or State court if it appears that the applicant has failed to make a motion for relief under this section or that the Superior Court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

28/ See Appendix, infra, at 13a. The Attorney General's "summary" which accompanied the transmittal letter of July 11, 1969 is a lengthy document. We have reproduced those portions of the summary which speak to the respective jurisdictions of the local and federal courts or which deal with § 110. Those portions, set forth at pages 9a-13a of the Appendix, are sufficient to give the tenor of the comprehensive document and include all references to the section at issue here.

29/ Compare S. Rep. No. 91-405, 91st Cong., 1st Sess. at 38 (1969) and H.R. Rep. No. 91-907, 91st Cong., 2d Sess. at 117 (1970) with the Attorney General's "Summary", infra at 13a. See 515 F.2d at 1306-1307; Pet. at 28a-30a.

however, is the fact that nowhere in the Attorney General's transmittal letter or accompanying summary is there so much as a whisper to the effect that the traditional habeas corpus power of the federal district courts would be affected by enactment of the proposed legislation. Quite the opposite is the flavor of the Attorney General's transmittal letter:

> [The proposed legislation] provides for the gradual transfer of all purely local jurisdiction to the District of Columbia Court System. The transfer would eventually raise the U.S. District Court to the status of a true federal court, unencumbered by the purely local jurisdiction which it alone, among all the federal courts in the country, now exercises. 30/

While we think it would have been quite appropriate for a lower court to have placed heavy reliance on these documents as it turned to the question of statutory construction, we are content at this stage of the proceedings to urge a much more modest use. Surely, the en banc Court of Appeals cannot be faulted for having read § 110(g) as did those involved in the drafting, circulation and transmission to Congress of that very statute. Yet that is exactly what petitioners must do to prevail here, for they have cited not one word in the legislative materials to indicate that Congress read § 110(g) any differently or that it understood the broad jurisdictional implications of the construction advanced by petitioners and chose to confront the constitutional issues which that construction raises. It is equally clear that the Court of Appeals struck precisely the right balance when it left the Department of Justice free to make a deliberate legislative proposal to the Congress and afforded that body an opportunity to consider and debate the policy and constitutional

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30/ See Appendix, infra, at 7a . Although the Attorney General's transmittal letter is printed in the legislative record, Hearings, supra n.24, at 4-5, we have reproduced that letter in the Appendix for the Court's convenience. Solely for the sake of completeness, we have also included in the Appendix the final document furnished to us by the Department of Justice. That document, entitled "Summary of Amendments Relating to Criminal Law and Procedure, May Circulation Draft", does not address the issue involved in this case since the introductory clause "[a]s is the case in federal courts" makes it clear that the reference is to the habeas corpus jurisdiction of the local courts, and not to the federal courts. See Appendix, infra, at 14a-15a.

implications of a straightforward recommendation that the habeas corpus jurisdiction of the district courts be curtailed.

III

The Judgment of the Court of Appeals Is Sustainable on Alternative Grounds

The judgment of the Court of Appeals (Pet. at 53a-54a, 49a) reinstates Palmore's case and directs the District Court to consider the merits of the Fourth Amendment issue. Even on the arguendo assumption that Congress deprived the district courts of the power to issue writs of habeas corpus to those such as Palmore, this judgment would nonetheless have to be sustained for the District Court has jurisdiction over Palmore's case quite apart from 28 U.S.C. §§ 2241 et seq. and power to award relief other than the writ of habeas corpus.

The traditional remedy for testing the lawfulness of an incarceration is the writ of habeas corpus. Fay v. Noia, 372 U.S. 391, 390-400 (1963). The writ, however, is only a judicial remedy, albeit such an important one that it is afforded constitutional status, and a federal judge may only issue the writ in a case "within [his] respective jurisdiction." 28 U.S.C. § 2241(a). Since it is axiomatic that the power to award a particular remedy is sharply to be distinguished from a federal court's jurisdiction over the case before it,[31/] it is not correct to say, as petitioners do, that the District Court is deprived of "jurisdiction" even if it is to withhold a particular remedy. "Jurisdiction", in the sense that petitioners use the term, "means the kinds of issues which give right of entrance to federal courts", Skelly Oil Co. v. Phillips Co., 339 U.S. 667, 671 (1950), and not the power to issue a particular remedy. Avco Corp.

31/ E.g., Avco Corp. v. Aero Lodge No. 735, 390 U.S. 557, 560-561 (1968); Skelly Oil Co. v. Phillips Co., 339 U.S. 667, 671-672 (1950); Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 239-241 (1937); Swift & Co. v. United States, 276 U.S. 311, 331 (1928).

v. Aero Lodge No. 735, 390 U.S. 557, 561 (1968).

The power of a federal district court to issue a writ of habeas corpus when it finds a prisoner held in violation of the Constitution is an exercise of that part of the judicial power which extends to "cases, in law and equity, arising under this Constitution ...." U.S. Const., Art. III, § 2. E.g., Ex parte Royall, 117 U.S. 241, 249 (1886). The federal habeas corpus statutes are not the exclusive repository of such jurisdiction, for the general federal question statute, 28 U.S.C. § 1331, grants original jurisdiction to the district courts over civil actions arising under the Constitution and which involve a matter capable of valuation in excess of ten thousand dollars.[32/] Even on the arguendo assumption that the writ of habeas corpus has been legislatively removed from the arsenal of corrective remedies available to a federal district judge confronted with a claim of unconstitutional confinement, the judgment of the Court of Appeals must be sustained if any judicial remedy was available to Palmore. The obvious alternative remedy is the declaratory judgment followed, if need be, by coercive relief. 28 U.S.C. §§ 2201-2202. That remedy not infrequently serves the same office as the writ of habeas corpus,[33/] and no matter how § 110(g) is read, it

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32/ As the case comes to this Court, Palmore's pleading specifically invokes the jurisdiction of the District Court pursuant to 28 U.S.C. § 1331 in addition to the habeas corpus jurisdiction granted by 28 U.S.C. §§ 2241 et seq. See supra at 2 n.1. That Palmore's case arises directly under the Fourth Amendment cannot seriously be contested; that the six-year restriction on his freedom, including actual incarceration for six months, is capable of valuation in excess of $10,000 is obvious.

33/ E.g., Brownell v. Tom We Shung, 352 U.S. 180 (1956); Shaughnessy v. Pedreiro, 349 U.S. 48 (1955); Hurley v. Reed, 288 F.2d 844 (D.C. Cir. 1961); Rose v. McNamara, 252 F. Supp. 111 (D.D.C. 1966), aff'd 375 F.2d 925 (D.C. Cir. 1967). To be sure, a number of cases say that declaratory relief is not a "substitute" for the writ of habeas corpus, but the courts which have most often repeated that point have been quick to hold the declaratory remedy available when the writ of habeas corpus is not. Compare, e.g., Clark v. Menlo, 174 F.2d 978 (D.C. Cir. 1949) and Forsythe v. Ohio, 333 F.2d 678 (6 Cir. 1964) with Koyce v. United States Board of Parole, 306 F.2d 759 (D.C. Cir. 1962) and Braden v. 30th Judicial District, 454 F.2d 145, 147 n.1 (6 Cir. 1972), rev'd on other grounds, 410 U.S. 484 (1973). See also, Sobell v. Attorney General, 400 F.2d 986 (3 Cir.), cert. denied, 393 U.S. 940 (1968); Note, Habeas Corpus, Custody and Declaratory Judgment, 53 U. Va. L. Rev. 673 (1967).

cannot be construed to affect the federal question jurisdiction of the federal district courts or to curtail the power to award appropriate declaratory and other relief pursuant to 28 U.S.C. §§ 2201-2202.

Finding that Congress had not repealed a portion of the federal habeas corpus jurisdiction, the Court of Appeals had no occasion to reach this alternative jurisdictional ground or to consider the availability of declaratory and other relief in a case such as this. Those issues, squarely posed by Palmore's amended jurisdictional allegations and fully briefed and argued below,[34/] must be decided before the judgment of the Court of Appeals can be overturned. Petitioners make no claim that Congress also repealed by implication portions of 28 U.S.C. §§ 1331, 2201-2202. Such a contention cannot be maintained by reliance on the plain meaning of § 110(g). Accordingly, even were review by this Court warranted on the other points pressed by petitioners, certiorari should nonetheless be denied since the judgment is sustainable on these alternative grounds without regard to the correctness of the reasons which the court below advanced.

Conclusion

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

FRANK F. FLEGAL
600 New Jersey Avenue, N. W.
Washington, D. C. 20001

Counsel for Respondent

34/ The Court of Appeals reserved ruling on Palmore's motion for leave to amend the jurisdictional allegations set forth in his petition for writ of habeas corpus until it had considered the briefs and memoranda of the parties and oral arguments of counsel. After argument, but before its opinion was released, the Court of Appeals granted Palmore's motion and an appropriate amendment was thereafter filed in the District Court after the record was returned by the Court of Appeals. Copies of the amended allegations were appropriately served upon the United States Attorney, and an additional copy was furnished to the Solicitor General in September, 1975.

APPENDIX

Additional Statutory Provisions Involved

28 U.S.C. § 1331 provides, in pertinent part:

> The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest or costs, and arises under the Constitution, laws, or treaties of the United States. ***

28 U.S.C. § 2201 provides:

> In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be r[illegible]wable as such.

28 U.S.C. § 2202 provides:

> Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

28 U.S.C. § 2244 provides, in pertinent part:

> (a) No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus and the petition presents no new ground not heretofore presented and determined, and the judge or court is satisfied that the ends of justice will not be served by such inquiry.
>
> (b) When after an evidentiary hearing on the merits of a material factual issue, or after a hearing on the merits of an issue of law, a person in custody pursuant to a judgment of a State court has been denied by a court of the United States or a justice or judge of the United States release from custody or other remedy on an application for a writ of habeas corpus, a subsequent application for a writ of habeas corpus in behalf of such person need not be entertained by a court of the United States or a justice or judge of the United States unless the application alleges and is predicated on a factual or other ground not adjudicated on the hearing of the earlier application for the writ, and unless the court, justice, or judge is satisfied that the applicant has not on the earlier application deliberately withheld the newly asserted ground or otherwise abused the writ. ***

Lawton

MEMORANDA OF LAW

CRIMINAL PROCEDURE SECTIONS

COURT REORGANIZATION ACT OF 1969

Working Draft
July, 1969

Post Conviction Remedies
§ 402 enacting D.C. Code 23-110

Issue:

Should a provision similar to 28 U.S.C. 2255 be enacted to govern post-conviction remedies in the new court system?

Existing Law:

The District of Columbia courts have inherent power to vacate sentences and grant post conviction relief. Burke v. United States, 103 A. 2d 347 (D.C. Mun. App. 1954) and Ingols v. District of Columbia, _____ A. 2d _____ (D.C. Mun. App. 1954). However there is no statutory provision governing the use of that power by local courts. The Federal Statute on post conviction remedies 28 U.S.C. 2255 does not apply in Local District of Columbia courts. Burke and Ingols, supra.

Proposed Law:

Proposed §23-110 is taken almost verbatim from 28 U.S.C. 2255. §23-110 therefore provides:

(1) A prisoner in custody under sentence of the Supreme Court who claims that his sentence was imposed in violation of the Constitution and courts of the United States or without jurisdiction may move that court to vacate sentence.

(2) The motion may be made at any time.

(3) The court may, after the hearing vacate and set aside the judgment and discharge or resentence or retry the prisoner.

(4) "An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief, by motion pursuant to this section shall not be entertained in any court if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention."

[-3a-]

The only changes are in the court name and in the last paragraph (item 4) which has been altered to make it clear that a habeas corpus motion shall not be entertained in any court unless the prisoner has first filed motion to vacate judgment in the Superior Court of the District of Columbia when that is the appropriate remedy.

Arguments in Favor

There are two basic reasons to including this proposal in the Court Reorganization Act.

First, although the local D.C. Courts have power to entertain motions to vacate, this proposal codifies that power and stipulates the procedure to be followed. This is a useful clarification which should be especially helpful as litigation in the new Superior Court increases. With the increase in felony jurisdiction as proposed by this Act, we may anticipate more challenges in the Superior Court to the commensurately long or felony sentences. The procedure for vacating sentence should be clear both for the purpose of safeguarding the rights of those imprisoned and for the purpose of minimizing unnecessary litigation over procedures.

Second, the bench and bar will be aided by the convenience of uniform procedures in Federal and local courts.

Analysis of Legal Problems:

There appears to be no opposition to this proposal. Although the Federal provision, 28 U.S.C. 2255 was expressly held inapplicable to the local District of Columbia Courts in Burke, supra, that case did not hold that there was any inherent lack of power in the local courts. The federal provision was held inapplicable to the District of Columbia merely because of Congressional intent and strict interpretation of the phrase "a court

[-4-]

established by Act of Congress". Therefore, there is no bar to inclusion of a §2255 provision for post-conviction remedies in the D.C. Code.

[-35-]

Office of the Attorney General
Washington, D. C. 20530

July 11, 1969

The Speaker
House of Representatives
Washington, D. C. 20515

Dear Mr. Speaker:

Enclosed for your consideration and appropriate reference is a legislative proposal to reorganize the court systems in the District of Columbia.

The proposal consists of six titles. Title I is a reenactment and revision of title 11 of the District of Columbia Code, "Organization and Jurisdiction of the Courts." In addition it contains certain interim provisions to protect the rights of persons affected by, and to effectuate the provisions of, the court reorganization. Title II consists of amendments to titles 12 through 17 of the D.C. Code, relating to judicial procedures. For the most part, these are technical amendments necessitated by the court reorganization. Title III consists of amendments to titles 18 through 21 of the D.C. Code, "Decedents Estates and Fiduciary Relations." These amendments also are primarily technical. Title IV contains several amendments to the D.C. penal laws and provides for the amendment, codification and enactment into positive law of title 23 of the D.C. Code, "Criminal Procedure." Title V consists of technical amendments to all other affected provisions of D.C. law. Title VI contains the usual separability provision, a provision that the Act shall become effective six months after enactment, and authority to fill additional judgeships on the D.C. courts prior to the effective date of the Act.

In view of the length and complexity of this proposed legislation, summaries of the various parts of the bill are attached. However, it is pertinent in this letter to call your attention to the most significant aspects of the bill.

The proposed revision of title 11 of the D.C. Code would establish a new Superior Court which would be the trial court of general local jurisdiction in the District of Columbia. In addition to the new jurisdiction conferred upon it, the Superior Court would absorb the jurisdiction presently exercised by the Court of General Sessions, Juvenile Court and D.C. Tax Court. This new Superior Court, together with an expanded District of Columbia Court of Appeals, would constitute the District of Columbia Court System.

It provides for the gradual transfer of all purely local jurisdiction to the District of Columbia Court System. The transfer would eventually raise the U.S. District Court to the status of a true federal court, unencumbered by the purely local jurisdiction which it alone, among all the federal courts in the country, now exercises. This is consistent with the President's directive of January 31, 1969 to draft "appropriate legislation providing for a reorganization and restructuring of our present court system toward the eventual goal of creating one local court of general, civil, criminal and juvenile jurisdiction for the District of Columbia."

In the revision of title 11, other changes have been incorporated to improve the administration of justice in the District. For example, the Superior Court would include a Family Division with broader powers to resolve intra family matters than can now be exercised by either the Juvenile Court or the Domestic Relations Branch of the Court of General Sessions. Specific provisions for the improvement of court management and new provisions substituting a modern Medical Examiner for the old coroner system have been included in the new title 11. Changes in

other portions of title 11, such as the judicial retirement provision, have also been included.

The revisions in titles 12 through 17 of the D.C. Code presently contain no changes in subchapter I, chapter 23 of title 16 of the Code -- Juvenile Proceedings. Not even technical changes have been made in these provisions since the Department of Justice, in cooperation with the Department of Health, Education and Welfare and the District of Columbia Government, is currently revising the law governing juvenile procedures in the District. That revision will be submitted to you as soon as possible.

Section 402 of this bill is the codification of title 23, "Criminal Procedure." The creation of the new court system necessitated changes in existing law and required new procedures for the operation of the courts. It therefore seemed advantageous to codify the entire title.

I urge the prompt enactment of this legislation.

The Bureau of the Budget has advised that this legislation is in accord with the Program of the President.

Sincerely,

Attorney General

SUMMARY OF PROPOSED DISTRICT OF COLUMBIA
COURT REORGANIZATION ACT OF 1969

The proposed District of Columbia Court Reorganization Act of 1969 is a comprehensive bill restructuring the District of Columbia Courts, transferring jurisdiction from the Federal courts in the District to the District of Columbia Courts, revising the District's code of criminal procedure, and making conforming changes throughout the District of Columbia Code. It consists of six titles, described in detail below.

TITLE I

The first title of the bill is comprised of a revision and reenactment of title 11 of the D.C. Code and certain transitional sections relating to the personnel and property of the present D.C. courts.

Section 101, the revision of title 11 of the D.C. Code, would substantially reorganize the court systems in the District of Columbia. It is designed to establish, in gradual stages, federal and local court systems which would be analogous to the systems existing in the States. Thus, the federal courts would ultimately have only federal jurisdiction, with all local jurisdiction vested in the District of Columbia courts. However, the U.S. Attorney and U.S. Marshal would continue to serve both federal and local courts.

The present Court of General Sessions, Juvenile Court and D.C. Tax Court would be consolidated and upgraded into a single Superior Court of expanded jurisdiction which would be the trial court for the District. The present Court of Appeals would continue to hear appeals from the local trial court and would become the highest appellate court for local matters in the District, equivalent to the highest court of a State.

Chapter 1 describes the federal and local courts in the District and equates the D.C. Court of Appeals with the highest court of a State.

Chapter 3 preserves the jurisdiction of the U.S. Court of Appeals for the District of Columbia Circuit over appeals from the D.C. Court of Appeals which are pending or may still be filed on the effective date of the Act or which involve federal misdemeanors tried in the D.C. court. It provides for the continued publication of the U.S. App. D.C. reports for so long as the court retains substantial local appellate jurisdiction.

Chapter 5 preserves the federal jurisdiction of the District Court. It gradually diminishes local civil jurisdiction, some being transferred to the Superior Court on the effective date of the Act, and the remainder in two subsequent stages. Local criminal jurisdiction is also transferred gradually, in two stages.

Provisions relating to employees of the District Court, except the auditor, have been omitted since they are covered by provisions applicable generally to federal courts.

Chapter 7 provides a nine-member D.C. Court of Appeals and continues the provisions for three-judge divisions and in banc hearings. The Court would hear all appeals from the Superior Court, appeals from administrative decisions as provided in the 1968 D.C. Administrative Procedure Act and all appeals from orders and decisions of the D.C. Public Service Commission. The Court would be authorized to hear interlocutory appeals from the Superior Court including orders to suppress evidence. Appeals would also be permitted from rulings on controlling issues of law, made during trial, in both civil and criminal cases.

Judges of the Court of Appeals could be assigned to Superior Court and Superior Court judges could be assigned

to the Court of Appeals when necessary. The Chief Judge would be authorized to designate the judge who would act in his stead. Judicial salaries would be equated with level III of the Federal Executive scale -- $2500 below judges of federal appellate courts.

The Court of Appeals could make its own rules of procedure, and would approve the general civil and criminal rules of the trial court.

Chapter 9 consolidates the District of Columbia Court of General Sessions, Juvenile Court and Tax Court into a single Superior Court. The Court would consist initially of 37 judges -- an increase of 10 over the total number of judges of the three courts. The number of judges would subsequently be increased in stages to a total number tentatively proposed as fifty judges. The Superior Court would ultimately be divided into four divisions -- civil, criminal, family and probate. Judicial salaries would be equated with level IV of the Federal Executive scale -- equal to the U.S. Attorney and $2000 below federal trial judges.

The Chief Judge would be empowered to rotate judges among the divisions and would be authorized to designate the judge who acts in his stead.

The civil jurisdiction of the court would be increased on the effective date (six months after enactment) to cover all personal injury actions of a purely local nature and all other local civil and equity cases where the amount in controversy is $50,000 or less. Other transfers on the effective date include D.C. land condemnation, real property actions, quo warranto actions against D.C officials and corporations, habeas corpus against all but federal officials, and commensurate equity jurisdiction. Additional jurisdiction would be transferred in two further stages. The second stage (eighteen months after the first, i.e. two years after enactment) includes probate jurisdiction, hospitalization

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of the mentally ill, and various actions relating to the property and estates of individuals. The third stage (two and one-half years after the first, i.e. three years after enactment) would vest all other non-federal jurisdiction.

Criminal jurisdiction would be transferred in two stages. The first stage (six months after enactment) includes all D.C. felonies except certain enumerated crimes punishable by 15 years or more imprisonment. The second stage (two years after enactment) includes all remaining D.C. felonies. The federal court would retain jurisdiction to try any D.C. felonies joined in the same indictment with federal felonies. The Superior Court would continue to hold preliminary hearings in federal criminal cases until the second stage of jurisdictional transfer. When all local jurisdiction is transferred to Superior Court, all federal jurisdiction would revert to the District Court.

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Title IV

The fourth title of the bill amends the criminal law provisions of the District of Columbia code, particularly criminal procedure, to take into account the court reorganization. Some new provisions were required to replace the Federal Rules of Criminal Procedure presently governing local felony cases tried in the U.S. District Court and old provisions were revised to bring them up to date. Since this resulted in changes throughout the present title 23 of the Code, the title as a whole would be enacted into positive law.

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Section 402 is the codification of title 23 of the D.C. Code "Criminal Procedure". Most of the present uncodified title is merely repeated without substantial change, and many of the amendments would merely apply provisions of the Federal Rules to cases in the Superior Court.

In Chapter 1, the following provisions would alter prior statutory law:

Section 23-101(d) and (e) provides for joining offenses prosecuted by the United States and the District of Columbia in a single indictment or information, or for trial.

Section 23-103, modeled on Federal Rule 32(a)(1), provides that both defendant and prosecutor shall be allowed to address the court on sentence before it is imposed.

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Section . -104 clarifies the present statute on appeals by the Government. Subsection (a) is prior law except for a provision, taken from Federal Rule 41(e), requiring motions to suppress evidence to be made before trial. Subsection (b) implements this requirement by allowing interlocutory Government appeal from the suppression of evidence during trial. Subsection (c) clarifies prior law on the Government's right to appeal from orders dismissing criminal charges. Subsection (d) allows the Government to appeal any other ruling made during a trial which

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involves a substantial and recurring question of law. The trial court may allow an interlocutory appeal, or the appeal may be taken after trial. This provision also seeks to clarify and to mandate the intent of Congress in present law, D.C. Code § 23-105, to allow Government appeals after acquittal of the defendant.

Section 23-105 adds provisions from the Federal Rules to present §§23-107 and 108 on challenges to jurors. It expressly provides for equal numbers of challenges for prosecution and defense, a principle implied in present law.

Section 23-106 substitutes Federal Rule 17(b) for present D.C. Code § 23-109, on defense witnesses, a change only in language.

Section 23-107 clarifies present D.C. Code § 23-110 on procedures for obtaining the testimony of jointly charged defendants either for each other or for the Government.

Section 23-108 changes present D.C. Code §§ 23-111 and 112 on depositions of defense witnesses by allowing the prosecutor to object to a deposition and by eliminating an archaic preference for depositions on written interrogatories.

Section 23-110 is new. Rather than relying on the inherent power of the Superior Court to review convictions, it applies statutory procedures for post-conviction challenges. It follows 28 U.S.C. 2255 with only the necessary technical changes.

Section 23-111 which is new, establishes uniform procedures for determining whether a person convicted of crime is subject to an increased penalty because of his prior convictions (e.g., sections 401(1) and (2), discussed above; D.C.

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SUMMARY OF AMENDMENTS RELATING TO CRIMINAL LAW AND PROCEDURE

The amendments to the District of Columbia laws relating to criminal law and procedure reflect the proposed transfer of criminal jurisdiction. Several substantive changes have been included to fill gaps now existing in the law and to provide certain procedures in District of Columbia courts which now exist in the federal courts in the District. Since many of these new provisions would be in the law relating to criminal procedure, it was considered an advantageous time to codify title 23 of the D.C. Code and enact it into positive law. This is done in section 402 of the proposed legislation.

Section 401 consists of three amendments to the D.C. penal laws. The first is an amendment to the provision for added penalty for repeat offenders (D.C. Code § 22-104) which is utilized primarily in misdemeanor cases. It makes clear that the same offense committed in other jurisdictions will be considered a prior offense for purposes of D.C. law. It assures the defendant a trial on the issue of prior record if he contests it, and permits the prosecutor to raise the issue of prior record within six months after sentencing if he does not discover it until then.

A new provision for additional penalties for persistent felony offenders would be added. It is modeled on the New York law and would authorize an indeterminate sentence up to life for a third felony offender. Again, the defendant would be entitled to a trial on the issue of prior record and the prosecutor would be permitted to raise the issue within six months after sentencing if he did not discover it until then.

A conspiracy provision would be added to D.C law. It is modeled on the New York provision, rather than the federal law, because of the necessity of greater specificity in a conspiracy provision applicable to a

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geographically limited area. The penalty for conspiracy would be the maximum penalty for the offense which is the subject of the conspiracy, or 5 years and/or $10,000, whichever is less. Proof of an overt act would be required.

Section 402 of the proposed legislation is the codification of title 23 -- "Criminal Procedure."

Chapter 1 consists of general provisions relating to prosecution, trial and sentencing. Much of it is existing law, modified to recognize the felony jurisdiction of Superior Court. However, the following changes have been included. Section 23-101 expressly authorizes joinder of municipal ordinance violations and offenses in violation of statutory provisions. Section 23-103, modeled on the federal rule, states the defendant's right of allocution, and expressly provides that the prosecutor, in his discretion, may recommend as to sentence. Section 23-104 restates existing law on appeal by the government, but adds a provision for retrial of the defendant if there was error in a ruling against the government sufficient to justify a mistrial. Section 23-105 clarifies the provision on challenges to jurors, permits challenges to be exercised jointly or separately in cases of multiple defendants, allows the prosecution the same number of challenges as the defense in all cases, permits additional challenges when alternate jurors are used, and permits the setting aside of a verdict if a cause for juror disqualification is later discovered.

Section 23-108 simplifies the existing provision on the taking of depositions of defense witnesses and adds the requirement of prosecutorial consent when a deposition is to be used.

Section 23-110 is a new provision, paralleling 28 U.S.C. 2255, and requiring that a prisoner challenging his conviction or sentence do so in the convicting court. As is the case in federal courts, habeas corpus would be barred unless the statutory remedy is inadequate or ineffective.

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